



Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005

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Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005

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House: Senate

Portfolio: Communications, Information Technology and the Arts

Commencement: Various

Purpose

This Bill amends the *Telecommunications Act 1997* ('the *Telecommunications Act*') and the *Trade Practice Act 1974* ("the TPA").

The significant elements are:

- providing for Telstra to develop a plan for the 'operational separation' of its network, wholesale and retail business units (schedule 11). Ostensibly, this is the most important part of this regulatory package
- making changes to parts XIB and XIC of the TPA
 - increasing the penalty for breach of competition rule (schedule 4)
 - providing for enforcement of conditions and limitations that apply to exemptions from the standard access obligations (schedule 5)
 - providing for revocation and variation of class exemptions from the standard access obligations (schedule 6)
 - giving power to the Australian Competition and Consumer Commission (ACCC) to be able to make procedural rules (schedule 7)
 - amending the objects of Part XIC (schedule 9)
 - allowing for interim determinations in access disputes – ACCC and consultation (Schedule 12)
- encouraging any-to-any connectivity (schedule 8)
- facilitating regulation of the telecommunications industry by the Australian Communications and Media Authority (ACMA)
 - providing for enforceable undertakings (schedule 10)
 - providing for remedial directions (schedule 13)
- other changes

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- repealing the requirement for carriers to have industry development plan (schedule 1)
- clarifying the powers of the ACMA in relation to enforcement of industry codes (schedule 2)
- making changes to the Numbering Plan; consultation (schedule 3)

Relationship of this Bill to other Bills

This is one of 5 interdependent Bills related to the sale of the Commonwealth's interest in Telstra. Other Bills deal with:

- the sale of the Commonwealth's interest in Telstra¹
- the 'Future Fund' proposed to be set aside from the sale proceeds to provide for regional services²
- the appropriation of funds to provide such services independently of the Fund³, and
- other measures concerning the funding of industry codes.⁴

General Background

Three elements of the Bill stand out. The requirement that Telstra develop a plan for the 'operational separation' of its network, wholesale and retail business units has the potential to yield the greatest changes to the regulatory landscape.

However, two other ostensibly innocuous, but important, changes are those made to the existing telecommunications-specific access and anti-competitive conduct schemes in parts XIC and XIB of the TPA. First, the amendments require the ACCC to have regard to Telstra's compliance with its operational separation obligations when it acts under parts XIB and XIC. This has the potential to undermine the effectiveness of those parts of the Act. This is because this requirement is capable of meaning that, when exercising power under parts XIB and XIC, the ACCC must be more lenient with Telstra if Telstra complies with its operational separation obligations.

Secondly, schedule 9 makes potentially significant changes to the matters to be considered in working out the meaning the meaning of 'long-term interests of end users' ('LTIE'). The promotion of the LTIE is a guiding principle in this part of the TPA.

According to the Explanatory Memorandum these Bills set the regulatory framework for Telstra, and the industry generally, in anticipation of, and following, the sale of the Commonwealth's remaining shares in Telstra Corporation. For instance, the Explanatory Memorandum states:

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‘One of the objectives of conducting this examination at this time is to have a settled and effective regulatory regime in place well in advance of the possible sale of Telstra. This would provide certainty for the financial market in the lead-up to a possible sale and reassure those markets that the Government would not toughen up the regulatory regime post sale.’⁵

This Digest deals with the elements of the Bill in the same order as the Explanatory Memorandum. ‘Concluding Comments’ will be made, as appropriate, within the discussion of each schedule.

‘Operational’ separation of Telstra into business units (schedule 11)

Background

The ‘operational’ separation framework is intended to address practical difficulties in the administration of the existing telecommunications-specific regulatory regimes in Parts XIB and XIC the TPA.

Schedule 11 aims to achieve the outcome of separating, in a largely unspecified manner, the business units of Telstra. The expressed object of separating Telstra is to promote the ‘principle of equivalence’ in the terms of supply by Telstra, of a limited set of services, to Telstra’s retail business and Telstra’s wholesale business customers (that is, its retail competitors). ‘Equivalence’ is intended to be achieved by allowing scrutiny of the terms, including price, on which Telstra supplies those wholesale services to itself. This will enable the ACCC to assess whether Telstra is engaging in anti-competitive conduct in relation to the supply of those wholesale services.

Separation is intended to be achieved by the imposition of a licence condition on Telstra. The licence condition will require Telstra to prepare an ‘operational separation plan’. Despite statements to the contrary in the Explanatory Memorandum,⁶ the legislation does not impose any particular model of separation, of which there are many, on Telstra. Rather, the model chosen by Telstra must be developed with the goal of satisfying a set of loosely expressed ‘objects’ set out in the Bill. These objects are mentioned at page 9 of this Digest.

In addition to a list of ‘objects’, this part of the Bill also has an ‘aim’ which is materially different from its object. The ‘aim’ is to promote principles of transparency and equivalence in relation to the supply by Telstra of *eligible services*.⁷ This may be contrasted with the first ‘object’ which is ‘to promote a principle of equivalence in relation to the supply by Telstra of *designated services* to Telstra’s wholesale customers and Telstra’s retail business units.

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The Bill thus makes a distinction between *eligible services* and *designated services*. The difference between *eligible services* and *designated services* is critical to the scope of the scheme. This is dealt with below in the section headed ‘Comments on the Bill’.

The detail of the process by which the plan is developed is set out below at page 9.

The need for separation – practical difficulties in existing regulations

The benefits of competition

Telecommunications services could be provided entirely by Telstra in much the same way as it had done prior to deregulation when Telstra (then Telecom) was the only domestic service provider. However, both Labor and Coalition governments have supported measures to introduce competition into telecommunications markets. A recent Productivity Commission Report⁸ cites a 2003 study by the Allen Consulting Group in which it is estimated that competition in telecommunications markets may have contributed \$12 billion to Australia’s GDP (to 2003).

Types of competition in telecommunications in Australia

In broad terms, competition in telecommunications can be at the infrastructure level (called ‘facilities-based competition’) and at the services level. Competition at the facilities level involves the construction of competing infrastructure. Services competition involves the provision of wholesale or retail services using the infrastructure of others.

Why regulation was needed – natural impediments to competition

The introduction of competition into the telecommunications market was not, and is not, free from difficulty. There are features of telecommunications markets that, in the absence of effective regulation, give an incumbent provider the ability, and incentive to hinder competition.

Telstra controls much of the telecommunications infrastructure which competitors must either duplicate, or have access to, in order to deliver services to users. The customer access network is, with the exception of a few CBDs and a handful of regional centres, controlled by Telstra. In general terms, the access network consists of part of the network which connects the customer’s premises to the local exchange. In addition, Telstra owns much (but certainly not all) of the transmission network which connects the local exchange back to the core network or to another operator’s network. This is particularly so outside of metropolitan areas where competition is less strong.

The cost of duplicating infrastructure — particularly the access network — is a significant barrier to entry in most markets and therefore a significant impediment to ‘facilities-based

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competition'. This feature, alone, give Telstra considerable market power in many wholesale markets.

Compounding the challenge posed by Telstra's power over these important elements of the physical network is that it is vertically integrated. That is, it operates at a retail level and competes against the same competitors to which, as network owner and wholesaler, it sells access. This vertical integration creates the ability and, critically, the incentive, for it to favour its own interests over those of its competitors. For instance, Telstra might do this by; providing services to its own retail division on better terms than those on which it provides the same services to competitors: it might provide the same service at a price which is notionally lower than its external wholesale price, or it might provide the same services at a different standard or provide services to itself which it does not provide to competitors.

Telstra therefore has both the *ability* to favour itself (through its ownership of the essential elements of the infrastructure) and the *incentive* (because of its vertical integration) to favour its own interests.

That Telstra might be able to do this is not consistent with the intention of competition principles, the general thrust of which is supported by both major parties.

The regulatory response to the natural monopoly that Telstra has in these critical network elements is the access regime. The scheme, in Part XIC of the TPA, provides for regulated access by competitive service providers to the infrastructure of other carriers like Telstra.

This is supplemented by a legislative scheme, in Part XIB of the TPA, which regulates anti-competitive conduct.

What is separation for?

There is a popular view that, despite these measures, Telstra continues to favour its own downstream retail operations over its competitors. Such behaviour may or may not be unlawful, anti-competitive conduct under Part XIB of the TPA. However, even if it is anti-competitive, there are practical difficulties in assessing Telstra's behaviour because of the lack of transparency in the way in which Telstra supplies services to itself. This is due, not least to the fact that Telstra does not actually 'sell' services to its retail operation. Accordingly, there are, in fact, no actual, legally binding, terms of supply as there are for third parties.

The various forms of separation are intended to address these practical difficulties in the administration of Parts XIB and XIC the TPA by promoting the 'principle of equivalence': that is, by promoting equivalence in the terms of supply by Telstra, of a limited set of services, to Telstra's retail business and Telstra's wholesale business customers (ie its

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retail competitors). Equivalence is intended to be achieved by allowing scrutiny of the terms, including price, on which Telstra supplies those wholesale services to itself. This will enable the ACCC to assess whether Telstra is engaging in anti-competitive conduct in relation to the supply of those wholesale services. In the words of Mr Graeme Samuel, the ACCC Chairman:

... separation is simply designed to produce some transparency in the dealings between Telstra's wholesale division and its retail businesses, and then to ensure that there is some equivalence of dealing in those dealings between its wholesale and retail businesses and Telstra's other wholesale customers. Now, that process is very important to us in being able to determine whether or not Telstra is engaging in anti-competitive conduct⁹.

The separation models

Many models of separation have been proposed for Telstra: 'accounting separation', 'operational separation' and 'structural separation' are terms that have gained some currency in the debate about the regulation of Telstra. These form a spectrum of models with different combinations of characteristics.

At one end of the spectrum are models relying on accounting separation. Such a model has been in place for some time but this was unsuccessful in yielding relevant information in the required form to the ACCC. The failure of accounting separation led to calls for some kind of actual, rather than notional, separation requirement.

At the other end are the models denoted by the expression 'structural separation'. These are typically characterised by the separation of Telstra into distinct corporate entities. There are variations within the structural separation models, with some models requiring, for instance, that there be no common directors and with restrictions on common ownership.

The models called 'operational separation' comprise the many models that fall into the broad space between accounting separation, which the Government admits has failed, and structural separation.

It is important to recognise that there is no generally accepted nomenclature in this area.¹⁰ One person's operational separation is another's structural separation. When asked, in a Senate committee hearing, about a particular combination of characteristics, described as 'operational' separation, Telstra's then head of Regulatory Affairs, Mr Bill Scales, said that it looked more like structural separation: 'if it looks like a duck, walks like a duck and quacks like a duck then it is a duck. This to me is structural separation under another name.'¹¹

Some of the characteristics of the different models that have been suggested include:

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- a requirement that the wholesale/network and retail businesses to deal with each other on a commercial, arms length basis, including explicit pricing, invoicing and billing
- that the business units maintain fully separate accounts and financial and non-financial reporting systems capable of capturing all transactions between the businesses
- that the business units maintain separate staff at all levels, and
- that the business units maintain separate premises and IT systems

The value of separation lies in the extent to which each model lessens both the *ability* to discriminate and the *incentive* to do so. Structural separation — at least a model with separate boards and ownership — is the model said to be most likely to be achieve this policy goal. One reason is simply that corporations law would require each separate business to be operated by their boards in the interests of their respective shareholders. This would tend to militate against the possibility of preferential terms being offered to Telstra's retail arm. Any model not relying on this mechanism will need to have, in addition to elements designed to ensure transparency, some other elements to lessen the *incentives* for discriminatory behaviour. The use of management performance schemes which are tied to the performance of business units rather than the company have been suggested as an answer to this problem.

The Bill's Scheme for Telstra's separation, in broad terms

The Bill does not impose separation on Telstra. The mechanism by which separation is to be achieved is by the imposition of a licence condition on Telstra. The licence condition will require Telstra to prepare an 'operational separation plan'. Despite statements to the contrary in the Explanatory Memorandum, the legislation does not impose any particular model of separation on Telstra. Rather, the model chosen by Telstra must be developed with the goal of satisfying the following set of loosely expressed objects set out in the Bill:

- the promotion of a 'principle of equivalence' in relation to the supply by Telstra of *designated services* to Telstra's wholesale customers and Telstra's retail business units
- to require Telstra to maintain at least one wholesale business unit, retail business unit and key network services business unit
- to promote a substantial degree of organisational and operational separation between Telstra's wholesale business units (considered as a group), retail business units (considered as a group) and key network services business units (considered as a group)
- to promote responsiveness by Telstra in meeting its wholesale customers' needs in relation to *eligible services* (importantly, 'eligible services' are different from 'designated services' mentioned in the first dot point); and
- to require Telstra to have a plan (to be known as the 'final operational separation plan') to achieve the aim and other objects of this Part

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- to ensure that Telstra has systems, procedures and processes that promote and facilitate;
 - compliance with the final operational separation plan
 - the monitoring of, and reporting on, compliance with the plan
 - the development of performance measures relating to compliance with the plan, and
 - audit, and other checks, of compliance with the plan.
- to ensure that the achievement of the aim and objective of this Part does not impair Telstra's ability to compete on a fair and efficient basis.

The scheme does not expressly require Telstra to comply with the final separation plan and it is not a condition of its carrier licence that it does.

The mechanism by which the scheme aims to induce compliance is by way of the 'rectification plan'. If Telstra contravenes the final separation plan, the Minister may require Telstra to produce a rectification plan which, in general terms, is a plan explaining how Telstra proposes to fix its own contravention of the final separation plan. The scheme requires Telstra to comply with the rectification plan.

In general terms, the schemes for both the separation plan and the rectification plan allow for the development and variation of a draft plan, by Telstra, in co-operation with the Minister. Through this process of development and revision, the draft plans are intended to lead to the plans becoming a 'final separation plan' or a 'final rectification plan' as the case may be. The scheme provides for the Minister to have a degree of control over the development of the plans by Telstra. The Minister can accept or not accept proposals by Telstra to vary the plans and the Minister can direct Telstra to make variations to the plans.

Details of the scheme for Telstra's separation

The following paragraphs set out the detail of the operation of the provisions dealing with the separation and rectification plans. The references to 'clauses' are to those in **new Part 8** of **schedule 1** of the *Telecommunications Act 1997*.

Aim and objects of the operational separation of Telstra

A distinction is drawn between the 'aim' and 'objects' of the separation scheme. Another distinction is made between the treatment of 'wholesale eligible services' (that is, all 'carriage services') and 'designated services' which is a subset of eligible services. 'Designated services' are those services specified by the Minister as such (**new clause 50A**).

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For ‘wholesale eligible services’ the ‘aim’ (as distinct from the ‘object’) is to ‘promote principles of transparency and equivalence’ in relation to the supply of those services by Telstra.

For ‘designated services’ the ‘object’ is to promote a ‘principle of equivalence’ in relation to the supply of those services by Telstra. It can be seen that, in relation to ‘designated services’, the object is not concerned with transparency, unlike the position in relation to ‘eligible services’.

An ‘object’ in relation to ‘eligible services’ is to ‘promote responsiveness by Telstra in meeting its wholesale customers’ needs in relation to’ those services.

It may be noted in both cases that the aim and object is not to *require* equivalence or even to *promote equivalence* but to *promote the principle of equivalence*.

The distinction between a legislative ‘aim’ and a legislative ‘object’ is not clear. However, an ‘object’ has force as an interpretative aid under the *Acts Interpretation Act 1901*.

The Separation Plan

Minister to decide which services will be subject to the object of equivalence

After the Bill receives Royal Assent, the Minister will determine which wholesale services will be subject to an obligation of equivalence: that is, which services will be ‘designated services’ (section 50A). The Minister may also make a determination about the requirements of the *draft* separation plan that Telstra is to produce (**new subclause 51(d)**).

Telstra to prepare draft separation plan

Ninety days after the date fixed by Proclamation (which is to be no more than six months after the Bill receives Royal Assent), Telstra is to prepare a *draft* separation plan and give it to the Minister (**new clause 52**).

Publication of draft separation plan on Telstra’s website

Prior to giving the *draft* separation plan to the Minister, Telstra must publish a preliminary version of the *draft* separation plan on its website and invite comments by the public. Thirty days are to be allowed for comments which are to be submitted to the Minister with the *draft* plan (**new clause 503**). Neither Telstra nor the Minister are required to have regard, or respond to, the comments.

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Minister to decide to accept or not accept draft separation plan

When the Minister receives the *draft* separation plan (and any comments from the public) the Minister must either approve or refuse to approve the plan. If the Minister does not make a decision within ninety days, the *draft* separation plan is taken to be approved and becomes a final separation plan (**new subclause 54(5)**).

Variation of the Draft Separation Plan on Direction of Minister

If the Minister does not accept the *draft* separation plan, the Minister can direct Telstra to prepare a variation of the *draft* separation plan (**new subclause 54(8)**). There is no time specified for the Minister to give such a direction. Telstra must make the variation to the *draft* separation plan and give it to the Minister within sixty days of the direction (**subclause 54(8)**).

Final Separation Plan

If the Minister accepts the *draft* plan and the variation, if there is one, the plan becomes a 'final separation plan' (**new clause 55**). The plan is *not* a legislative instrument (**subclause 55(2)**). This is important and is discussed below at page 18.

Final Separation Plan – no requirement to comply

There is no express requirement for Telstra to comply with the final separation plan and compliance with it is not a licence condition (**new subclause 55(3)**). This is different from the express obligation to comply with the final rectification plan in **new clause 65** (see below at page 12).

Variation of Final Separation Plan – on Telstra's initiative

Once the plan becomes a final separation plan and is in force, Telstra may give the Minister a *draft* variation of the final separation plan (**new subclause 56(1)**). Telstra must put the *draft* variation to the final separation plan on its website and allow twenty days for people to comment on it (**new clause 57**).

The Minister can accept the *draft* variation of the final separation plan or reject it (**new subclause 56(2)**). If the Minister does not make a decision within ninety days, the Minister is taken to have accepted the *draft* variation.

Variation of Final Separation Plan – on direction of Minister

The Minister may also direct Telstra to prepare a *draft* variation of the final separation plan (**new clause 56A**). Telstra has sixty days to prepare the *draft* variation. The Bill is silent about whether the Minister can accept or reject to *draft* variation prepared in response to the direction. This would appear to be a drafting flaw. It can be contrasted with the Minister's power to direct Telstra to vary the *draft* separation plan under **new**

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subclause 51(8). In that case the direction is to actually vary, not to prepare a ‘draft variation’. The use of the words ‘draft variation’ suggest that the Minister ought have the power not to accept the draft variation even though it is prepared at the Minister’s direction.

Once a final separation plan is in place, there is no express obligation to comply with it. Furthermore, the final separation plan is expressed to be not a licence condition (**new subclause 55(3)**).

The Rectification Plan — the compliance mechanism

Draft Rectification Plan

However, if Telstra contravenes the final separation plan, the Minister may direct Telstra to prepare a draft rectification plan (**new subclauses 60(1) & (2)**). The purpose of a rectification plan is for Telstra to set out the ways in which it is going to deal with its own contravention of the final separation plan. If the Minister does direct Telstra to produce a draft rectification plan, Telstra has ninety days to give the draft plan to the Minister (**new subclause 60(3)**).

Minister to decide to accept or not accept draft rectification plan

After the Minister receives the draft rectification plan, the Minister must decide whether to accept or not accept it (**new subclause 61(5)**). If the Minister does not make a decision within ninety days, the draft rectification plan is taken to be approved and becomes a final rectification plan (**new subclause 61(5)**).

Variation of the draft rectification plan

If the Minister does not accept the draft rectification plan, the Minister can direct Telstra to prepare a variation of the draft rectification plan (**new subclause 61(8)**). There is no time specified for the Minister to give such a direction. Telstra must make the variation to the draft rectification plan and give it to the Minister within 60 days of the direction (**new subclause 61(8)**).

Final Rectification Plan

If the Minister accepts the draft rectification plan and the variation, if there is one, the plan becomes a ‘final rectification plan’ (section 62). The plan is *not* a legislative instrument (**new subclause 62(2)**). This is important and is discussed below at page 18.

Compliance with Final Rectification plan — is it a licence condition?

Once the draft rectification plan becomes a final rectification plan and is in force, Telstra must comply with it (**new clause 65**). This is in contrast with the final separation plan for

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which there is no requirement to comply. However, the Bill is silent about whether Telstra must comply with the plan as a condition of its licence. This in contrast with the position in relation to the final separation plan, where compliance is expressly stated not to be a licence condition. According to principles of statutory interpretation, this express exclusion in the case of the separation plan implies that compliance with the rectification plan is a licence condition. However, this is not free from doubt. Much turns on this as licence conditions are enforceable under other provisions of the *Telecommunications Act*.

There is no requirement for Telstra to publish the final rectification plan on its website.

Variation of Final Rectification Plan — on Telstra's initiative

Once the plan becomes a final rectification plan and is in force, Telstra may give the Minister a *draft* variation of the final rectification plan (**new subclause 63(1)**). Telstra is not required to put the *draft* variation to the final separation plan on its website as it does in relation to the separation plan variations (**new clause 57**). The Explanatory Memorandum is silent about the reason for this difference in treatment.

The Minister can approve Telstra's *draft* variation of the final rectification plan or not approve it (**new subclause 63(2)**). If the Minister does not make a decision within 90 days, the Minister is taken to have approved the *draft* variation.

Variation of Final Rectification Plan — on direction of Minister

The Minister may also direct Telstra to prepare a *draft* variation the final rectification plan (**new clause 64**). Telstra has 60 days to prepare the *draft* variation. The Bill is silent about whether the Minister can accept or reject the *draft* variation prepared in response to the direction but presumably the Minister could give a further direction if the draft variation was not satisfactory. This can be contrasted with the Minister's power to direct Telstra to vary the *draft* separation plan under **new subclause 54(8)**. In that case the direction is to actually vary, not to prepare a '*draft* variation'. The use of the words '*draft* variation' suggest that the Minister ought have the power to not accept the *draft* variation even though it is prepared at the Minister's direction.

Other requirements of the plan

The operational separation plan is to include provisions requiring Telstra to report (**new subclause 51(1)(b)**), to arrange for auditing (**new subclause 51(1)(c)**) and to comply with other requirements specified by the Minister (**new subclause 51(1)(d)**). The requirements to report and to arrange auditing could have been imposed directly on Telstra rather than via the more circuitous route of imposing a obligation under the plan.

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Ministerial Review

The Minister is to conduct a review of the operational separation scheme before 1 July 2009 (**new section 61A** of the *Telecommunications Act*).

Interaction with Parts XIB and XIC

New sections 151CP and 152EQ of the Bill require the ACCC to have regard to Telstra's conduct in complying with the operational separation requirements when the ACCC performs a function or exercises a power under Parts XIB and XIC of the TPA.

Comments on the separation scheme

The scheme will require the co-operation of Telstra

The legislation merely provides a framework for the development of a separation plan by Telstra. In its expressed aim and objects (in **new subclause 48(1)** of **new Part 8** of Schedule 1 of the *Telecommunications Act*)—and in the expectations expressed in the Explanatory Memorandum—it appears to promise much. However, the Bill gives minimal guidance about the type of separation model that might be developed. Rather, the Bill requires that the separation plan satisfy the expressed objects and aim of the Bill each of which is expressed at a fairly high level of abstraction.

The following matters could influence the effectiveness of the separation scheme and suggest that the achievement of the intent of separating Telstra will depend very much on the co-operation of Telstra and the exercise of Ministerial powers:

- objects and aims which are expressed with a high level of abstraction
- limited application of equivalence requirement to 'designated services'
- gaming opportunities
- Telstra's approach to its obligation to prepare a Local Presence Plan (LPP)
- no incentives to comply
- unclear powers of enforcement
- public scrutiny – plans are not legislative instruments, and
- the interaction of the operational separation regime and Parts XIB and XIB is likely to lead to a weakening of the latter Parts.

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Uncertainty: objects and aims are expressed with a high level of abstraction

The Bill does not prescribe a particular model of separation but rather requires that Telstra's separation plan 'be directed towards the achievement of the aim and objects of [the separation scheme]' (**new paragraph 51(1)(a)**).

When read with the 'aim' and 'objects' of the separation scheme, however, this substantive obligation is uncertain. Taking the first object (in **new paragraph 48(2)(a)**) of the separation scheme as an example, the substantive obligation is that Telstra's separation plan must be directed towards the achievement of the *promotion of the principle of equivalence*. As a matter of statutory interpretation, the meaning of this obligation is far from clear and, as a practical matter, it will be difficult to assess what is required for Telstra to comply with this obligation. A clearer statement that Telstra's obligation is to supply services on equivalent terms may have been more appropriate.

A related issue is that the scheme has both an *aim* and *objects*. The inclusion of both an aim and objects is unusual and it is unclear why this legislative device has been used. As a matter of statutory interpretation, the use of different terms strongly suggests that they have different meanings. What that difference might be is not clear. Objects clauses are common and can be used to aid in the interpretation of provisions that are unclear. Clauses setting out the *aim* of legislation are less common and their status uncertain.

It is notable that the 'aim' clause and the first object clause are not entirely consistent. The inconsistency arises because the 'aim' clause is directed towards promoting the principle of equivalence in relation to 'wholesale eligible services'. The first object clause, however, is directed towards promoting the principle of equivalence in relation to 'designated services'. 'Eligible services' and 'designated services' are different as designated services are likely to form a much smaller class than 'eligible services'. Much may therefore turn on the relative status of the aim and objects clauses when consideration is given to Telstra's obligations in relation to services which are 'eligible' but not 'designated' services. This is an issue that may need to be considered by courts in the future.

Equivalence required only for 'designated services'

Assuming that the objects and the aim are not of equal status, the distinction between 'designated services' and 'eligible services' becomes critical to the scope of the separation scheme. The object of equivalence is relevant only to *designated services*. In relation to *eligible services* the principal obligation appears to be that Telstra is to endeavour to be responsive to wholesale customers' needs (without necessarily providing equivalence in the supply of those services.). The meaning of 'responsive to wholesale customers' needs' is not clear. Consequently, there are likely to be substantial practical difficulties for a party to establish that this principle is not satisfied.

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The Minister, in consultation with Telstra or alone, must determine which services are *designated services*. No consultation is required with, for instance, the ACCC. The services specified must be ‘active declared services’ within the meaning of section 152AR of the TPA unless the services are included in the first such Ministerial determination or if Telstra consents to the inclusion of other services. No variation to the determination is permitted without Telstra’s consent. ‘Active declared services’ are those declared services that are already being provided. A *declared service* is a service which has been ‘declared’ by the ACCC to fall within the regulatory net of the access regime in Part XIC.

The probable effect of this provision is that, after the Minister makes the first determination of designated services — that is, services in relation to which equivalence is required — no new services will fall within the equivalency requirement. These would include the new services that can be expected to be provided over so-called ‘next generation networks’.

Gaming opportunities

One part of the *Explanatory Memorandum* says that the Bill is a response to the problem of regulatory gaming. However, separation scheme set out in this Bill provides more opportunities for such gaming.

‘Gaming’ describes behaviour whereby a person takes advantage of rules or procedures to delay, alter or prevent decisions by regulators. The Explanatory Memorandum notes that, ‘it is difficult to establish parties’ intent to the point of establishing whether or not they are behaving in a vexatious manner. For this reason the preferred approach is to focus on removing the opportunities for gaming.’¹²

The Explanatory Memorandum identifies the existing undertakings process as providing some opportunities for gaming;

There are concerns that access providers are gaming the access undertaking process by knowingly lodging incomplete or otherwise unacceptable access undertakings in order to delay ACCC consideration of access disputes and therefore the possibility of binding ACCC decisions on access disputes in favour of access seekers.¹³

The Explanatory Memorandum further states;

Despite the amendments made to the access regime in 2002, the ACCC and several access seekers have reported that the operation of the access regime continues to be affected by the problem of delay, and by the problem of “gaming” of the regulatory arrangements (on legal process as well as substance) particularly by access providers. This has meant that the indicative six month timeframe for the resolution of access disputes and consideration of undertakings introduced in 2002 has rarely been met and is often extended by considerable periods.¹⁴

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Other parts of the Bill address these kinds of gaming problems. However, the operational separation scheme creates further gaming opportunities.

Because of the nature of the regulatory scheme, access providers (of which Telstra is the most significant) have the greatest incentives for regulatory gaming.

Telstra has publicly stated that it does not want to separate its business divisions and, indeed, that it cannot see the reason for it and regards it as 'a bit like a solution looking for a problem'.¹⁵ Under a scheme that has unclear enforcement mechanisms, and no explicit incentives for compliance, Telstra could respond to the requirements in this Bill by looking for opportunities to 'game' the process.

The opportunities for 'gaming' in the development of the separation plan are manifold and include, for instance;

- lodging an incomplete or unacceptable draft separation plan or final separation plan. This is an example given by the Explanatory Memorandum of the kind of gaming that already occurs in relation to undertakings¹⁶
- failing to respond adequately to Ministerial directions to vary the draft separation plan or draft rectification plan, or
- drafting the obligations in the plan in such a way that compliance is difficult to assess. Obligations could be framed imprecisely or in terms that Telstra use its 'reasonable endeavours' to do something.

Further, the process of preparing the draft separation plan, waiting for Ministerial scrutiny, acting on directions to vary the plan and initiating variations of its own could have many iterations and involve long delays unless Telstra co-operates or the Minister's exercises powers firmly and unambiguously.

In the event that a satisfactory final separation plan emerges from this process, the implementation of the plan could present further opportunities for gaming.

In the end, it can be expected that the separation plan will take a long time to develop and longer again to implement.

Telstra's LPP is instructive

Telstra's response to its obligation to produce a Local Presence Plan¹⁷ (LPP) in rural, regional and remote Australia may provide an indication of the way in which both Telstra and the Minister will act in relation to the separation plan. A draft plan was given to the Minister in September 2005.

What is notable about the draft LPP is that it is not drafted so as to express clear rights and obligations. Rather it is largely drafted as a collection of statements of fact, principle and intent. This is an example:

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4.4 Mobile services

Telstra provides a wide range of mobile, mobile satellite and mobile data services across regional Australia. As at the date of publication our regional mobile network covers approximately 1.6 million square kilometres and 98.3 per cent of the population. General information about our mobility services is available at: <http://www.telstra.com.au/mobile/index.htm>

In many rural locations the network has been expanded through joint initiatives with the Australian Government. A total of 187 communities have received new or improved coverage as a result of funding from programs arising out of the Telecommunications Service (Besley) Inquiry. A further 62 communities will receive coverage under the \$15.6 million mobile contract resulting from the Estens Inquiry. An additional 2,000 kilometres of coverage has been provided for major highways from these Government programs, in addition to Telstra-funded initiatives.

Telstra currently provides indicative information online on likely mobile coverage across Australia at: <http://www.telstra.com.au/mobile/networks/coverage/index.htm>

Telstra publishes a review of its mobile performance against commitments in the Telstra Customer Service Charter. This is available online at: <http://www.telstra.com.au/charter>.¹⁸

In the absence of any clear statement of Telstra's obligations, the plan is incapable of enforcement.

If the LPP signals the manner in which Telstra might approach the drafting of the separation plan then it would appear that the separation plan process could be lengthy. Certainly, if the final separation plan follows this model, it will be difficult to enforce and will lead to regulatory uncertainty. Much will depend on how the Minister's powers are used to shape the terms of the separation plan.

Although the legislative schemes under which the local presence plan and the separation plan are made is different, the Minister's response to this draft local plan may provide some indications about the degree of rigour that the Minister requires in these plans.

The separation and rectification plans are not required to be tabled

Significance of the *Legislative Instruments Act 2003*

It is expressly stated in the Bill that:

- the final operational separation plan
- a variation of the final operational separation plan, and
- the final rectification plan

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are *not* legislative instruments under the *Legislative Instruments Act* (clauses 55(2), 56(10), and 62(2)).

Under the *Legislative Instruments Act 2003* (Cth), legislative instruments are:

- registered on the Federal Registrar of Legislative Instruments in order to be enforceable
- tabled in Parliament, and
- subject to scrutiny and disallowance by Parliament.

It is often clear whether an instrument has the requisite ‘legislative character’¹⁹ to be a legislative instrument, but this is not always so. For this reason, the Senate Committee on Regulations and Ordinances has recommended that, where a subordinate instrument is expressed not to be a legislative instrument under the *Legislative Instruments Act*, the Explanatory Memorandum should explain the reason for this.

The Explanatory Memorandum for the Bill does not satisfy the Committee’s requirement because it does not offer a reason for why these plans are not legislative instruments for the purposes of the *Legislative Instruments Act*. The Explanatory Memorandum does, however, explain why other instruments *are* legislative instruments. For instance, it says:

Directions given by the ACCC under the amendments in Schedule 11 are specified not to be legislative instruments for the purposes of the LIA (since the making of a direction subject to merits review would generally not be considered to be legislative in character for the purposes of the LIA).²⁰

The reason why these are not treated as legislative instruments must be that the plans will not satisfy the definition of legislative instrument set out in section 5 of the *Legislative Instruments Act*. This provides that a legislative instrument must have a ‘legislative character’.

The effect of the separation and rectification plans not being legislative instruments is that they need not be tabled in Parliament and are not subject to disallowance.

The legislation could require the tabling of the separation and rectification plans even though they are not legislative instruments. For example, section 158Q of the *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005*²¹ requires the Minister to table, in both Houses of Parliament, the report of the Regional Telecommunication Independent Review Committee (RTIRC). Similarly, the Government’s response to the report must be tabled. In this Bill, not only are the separation plan and the rectification plan not legislative instruments, but they are not required to be tabled.

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Interaction with Parts XIB and XIC of the TPA

New sections 151CP and 152EQ of the Bill require the ACCC to have regard to Telstra's conduct in complying with the operational separation requirements when the ACCC performs a function or exercises a power under Parts XIB and XIC of the TPA. Although appearing to be innocuous, these provisions have the potential to undermine the operation of Parts XIB and XIC. This is because it would appear that the ACCC is required to apply Parts XIC and XIB less strictly where Telstra is complying with its obligations under the separation regime. Given that Telstra's obligations under the scheme are not clear and that it will be difficult to assess whether it is complying with them, the application of these two provisions is likely to present problems for the ACCC.

If the separation model produces the intended outcome of 'equivalence', that may not be, on balance, a poor outcome. But the potential weakening of Part XIB and XIC in circumstances in which separation does not achieve the aim of equivalence must mean that there is a general erosion of the regulatory regime. This could set the foundations for a lessening of competition.

Evidence of late drafting

This Bill was introduced into the Senate on Thursday, 8 September 2005 and passed with little debate on Wednesday, 14 September 2005. Parts of the Bill appear to have been drafted—or at least inserted—late in the process. For instance, a new Part of the Act contains provisions numbered 50, 50A, 50B and 50C. These would normally be numbered 50-54 in a new Part of the Act. This suggests that changes may have been hastily inserted just prior to introduction. Further, the inclusion of a definition of a term which is not otherwise used in the Bill points to the same conclusion: section 50C speaks of 'notional contracts' but that term nor any like it, is used in the Bill.

Changes to the telecommunications-specific competition regime in Parts XIB and XIC of the Trade Practices Act

Penalties for breaches of the competition rule – Schedule 4

Currently, under section 151BX of the TPA the Federal Court can impose a penalty for breach of a competition rule which does not exceed \$10 million for each contravention and \$1 million for each day that the contravention continues.

According to the Explanatory Memorandum these existing penalties are not considered to provide a sufficient deterrent to larger telecommunications companies.²² Therefore, the Bill proposes an increase in the per day penalty from \$1 million to \$3 million where the contravention continues for more than 21 days.

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As noted in the Committee Report of the recent Senate Inquiry into the Telstra (*Transition to Full Private Ownership*) Bill 2005 and other related bills, the ACCC welcomes these increased penalties.

Enforcement of conditions and limitations of SAO exemptions — Schedule 5

Under sections 152AS, 152ASA, 152AT and 152ATA of the TPA, the ACCC has the power to exempt individual or a specified classes of carriers or carriage providers from their standard access obligation (SAO) (as created by section 152AR of the TPA). The exemption is to be made by the ACCC in form of a written determination or order. Exemptions granted by the ACCC may be unconditional or may contain conditions or limitations which have to be specified expressly in the determination or order.

Under the current regime, the standard access obligations can be enforced against carriers or carriage providers by the Federal Court. Under section 152BB of the TPA, the Federal Court has the power not only to enforce compliance with the standard access obligation, but also to order payment of compensation to those affected by a violation of the standard access obligations or may make any other order it thinks appropriate. Application to the court may be made by the ACCC or a person whose interests are affected by the contravention.

Schedule 5, item 6 will insert **proposed new section 152BBAA** which will enable the Federal Court, in addition to its existing powers, to make orders with respect to breaches of conditions or limitations imposed upon exemptions by the ACCC. Like existing section 152BB, the new provision will allow the court to enforce compliance (in this instance with a condition or limitation on the exemption), but also to order payment of compensation to those affected by a violation of the standard access obligations or may make any other order it thinks appropriate. Application to the court may be made by the ACCC or a person whose interests are affected by the violation of the condition or limitation.

The proposed amendments will ensure that sections 152BB and 152BBAA will not limit each other in their application. New **subsection 152BBAA(3)** will provide that this proposed new section will not limit the operation of section 152BB. In turn, **schedule 5, item 5** will insert **new subsection 152BB(3)** which will provide that that section will not limit the operation of **new section 152BBAA**. This will clarify and ensure that potential complainants against carriers or carriage providers can proceed with their complaint either:

- under section 152BB—to enforce compliance with the standard access obligation, or
- under new section 152BBAA—to enforce compliance with the condition.

In other words, it provides potential complaints against carriers and carriage providers with a choice as to the cause of action they may want to take.

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Variation and revocation or exemption determinations - Schedule 6

Under sections 152AS and 152ASA of the TPA, the ACCC has the power to grant ordinary and anticipatory class exemptions from the standard access obligations.

Schedule 6, items 1 and 2 propose to add notes to sections 152AS and 152ASA which will clarify that the ACCC's power contained in these sections has to be read in light of subsection 33(3) of the *Acts Interpretation Act 1901*. This provision stipulates that:

Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. (emphasis added)

Accordingly, the power to make the determination to exempt carriers or carriage service providers carries with it not only the power to make the determination itself, but also the power to make other, related determinations, including, for example, determinations to vary a condition or limitation and to revoke the determination. However, these other or related determinations must be made by the ACCC and they must be made in a similar manner and subject to similar conditions as those expressly referred to in sections 152AS and 152ASA. Before the ACCC can vary a condition of an exemption, it must follow the procedure set out in these sections, including conducting a public consultation process (as specified in subsections 152AS(5) and 152AS(11)). The ACCC has to be satisfied that the variation is in the long-term interest of end-users (see discussion in relation to Schedule 9 of this Bill).

ACCC to be able to make procedural rules — Schedule 7

Schedule 7 of the Bill makes amendments to allow the ACCC to make 'Procedural Rules' which set out practices and procedures that it will follow. These rules are intended to lessen the rigidity in the ACCC's current processes and to reduce the resultant opportunities for industry participants to take advantage of these features to delay or frustrate decisions of the ACCC that might be unfavourable to them (that is, to engage in 'gaming').

For example, where a person wants to vary something that they have put before the ACCC for consideration (for instance, an application for an exemption from the standard access obligation or a variation of an undertaking), such application or variation may require the ACCC to start the whole process — including public consultation — again as if the application or variation were a new one. If several variations are made in succession, substantial delays may accrue. The Bill deals with such situation by allowing the ACCC to determine in the Procedural Rules the kinds of things that will be regarded as 'minor modifications' and which are not to be regarded as new applications.

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Another example is where the ACCC requests further information about a matter such as undertaking or a variation to an undertaking. Where insufficient information is given in response to such a request, further requests may need to be made, so delaying the relevant decision. The Bill attends to this problem by allowing the ACCC to specify in its Procedural Rules the time within which information is to be provided and allows the ACCC to refuse the application if the information is not provided in time.

Schedule 7 also makes provision for the ACCC to make Procedural Rules about the manner in which it will deal with undertakings that are received in relation to a matter that is already the subject of an access dispute. Such rules, if made, will displace the provisions in the Act which deal with the exercise of this discretion. This will allow the ACCC to deal more flexibly with situations where, for instance, it currently delays consideration of access disputes to consider undertakings (and perhaps variations of undertakings) which are lodged deliberately to delay the ACCC's consideration of the dispute.

Amendments to object of Part XIC – Schedule 9

Schedule 9 of the Bill sets out amendments to section 152AB of the TPA. Subsection 152AB(1) sets out the object of the access regime in Part XIC. It provides:

The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Subsection 152AB(2) sets out some of the factors that go towards assessing whether something meets this objective. Presently, these include whether the thing furthers the object of:

- promoting competition
- promoting achieving any-to-any connectivity
- encouraging the efficient use of infrastructure

To this list of considerations, schedule 9 adds the following further requirement;

- encouraging the efficient *investment* in infrastructure.

It is likely that this amendment will have an effect on decisions on access pricing. If access prices are too low, there may be insufficient incentive for infrastructure providers to invest in new infrastructure. Similarly, for access seekers, low access prices tip the balance in favour of accessing the infrastructure of others rather than building their own facilities.

Thus, the new requirement that regard must be had to whether a thing encourages efficient investment in infrastructure is likely to put upward pressure on access prices. This would

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arise, for instance, when the ACCC considers access prices in undertakings given by access providers.

In evidence to the Senate Committee on the amendment, Mr David Havyatt, Head of Regulatory Affairs for AAPT Ltd, made the following observation:

That amendment would mean that every interconnection agreement—every regulated service that is in place in the regulatory regime—would immediately be recontested by Telstra. They would take the issues to the Australian Competition Tribunal and they would be arguing for prices that are as much as twice the existing interconnection prices. It would take us back to all the issues that we were discussing in 2002 before the Australian Competition Tribunal. It is not a minor amendment; it has had no public consultation; there has been no advice from the ACCC about what they think the impact of that amendment would be.²³

AAPT Ltd's submission to the Committee also addressed this point:

Schedule 9 of the [Bill] introduces an amendment that fundamentally changes the application of the test, though departmental officers apparently believe it is an innocuous clarification.

AAPT submitted at length on the question of whether the regime adequately compensated for investment and risk, and concluded it did:

The current amendment, especially when read in conjunction with the Explanatory Memorandum, would have the consequence of justifying Telstra being compensated for its investment, the risk on new investment, and the cost of stranding its existing investment when the new investment is made.

All the competitive benefits would be lost and most competitors would exit the market.²⁴

Consultation for interim determinations in access disputes — Schedule 12

Removal of procedural fairness in relation to interim determinations

Division 8 of Part XIC of the TPA is concerned with the resolution of access disputes. Section 152CP provides that where there is a dispute over access to a declared service, the ACCC must make a written determination on access.²⁵

The ACCC will not be required to consult with the parties to an access dispute when making or varying an interim determination if certain conditions are met. These are that the ACCC has determined pricing principles or model terms and conditions in relation to the declared service (under section 152AQA or 152AQB respectively) and the terms and conditions of the interim determination are consistent with those pricing principles or the model terms and conditions as the case may be.

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This represents an abridgement of the usual requirements for procedural fairness. However, it only applies to an interim determination. An interim determination does not terminate arbitration.

However, the ACCC must still make a final determination in an access dispute. The full requirements for procedural fairness apply in respect of a final determination.

Subsection 152AQA(4) provides that, before the ACCC determines pricing principles under subsection 152AQA(1), it must publish a draft determination, invite comments on the draft and take those comment into consideration.

The aim of the amendment is to streamline the ACCC's process in relation to interim determinations with the goal of resolving access disputes in a more timely fashion. Parties still retain an opportunity to be heard on price-related terms and conditions in respect of the development of determinations on pricing principles and/or model terms and conditions.

Extension of interim determination period

The current position is that the maximum duration of an interim determination is 12 months and there is no power to extend this period. The amendments provide for the interim determination period to be extended.

Encouraging any-to-any connectivity – Schedule 8

Part XIC of the TPA sets out provisions relating to the telecommunications access regime. Subsection 152AB(1) provides that the object of Part XIC is:

to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services

Subsection 152AB(2) of the TPA provides that in relation to determining if a thing is in the long term interest of end users of listed services, regard must be had to, amongst other things:

the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users.

Subsection 152AB(8) provides that the:

objective of any-to-any connectivity is achieved if, and only if, each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.

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Schedule 8 of the Bill inserts new provisions into the *Telecommunications Act* imposing on carriers an obligation to ensure any-to-any connectivity for customers. At present, as noted in the Explanatory Memorandum for the Bill there is currently no such requirement. The practical effect is that it is possible for the carrier to deny any-to-any connectivity to end-users on a smaller network.

During the course of debate on the Bill, the provisions in Schedule 8 have not attracted much comment. Indeed the provisions did not fall within the Terms of Reference of the Committee's inquiry. However, it is noted that:

- the Australian Telecommunications User's Group supports the amendment,²⁶ and
- Mr Paul Stiffe, General Manager, Public Policy, Vodafone, in evidence to the Committee, made the follow comment in relation to any-to-any connectivity:

The third concern that we have relates to any-to-any connectivity. This seems to be quite a new idea and quite a novel concept in that it can require a party to have to purchase a service rather than supply a service. It seems to us on our reading that any telecommunications service could be regulated in this way. The threshold for intervention is very low; it is simply on the basis of any-to-any connectivity rather than economic efficiency or market power. There is certainly no public benefit test involved in any consideration. We do not know how that will work or why it is in there. We are also very concerned that it may actually not serve any particular purpose because, although you are required to purchase a wholesale service, there does not seem to be anything to require you to provide a retail service associated with that.²⁷

Facilitating regulation of the telecommunications industry by ACMA

Enforceable Undertakings - Schedule 10

At the present time, the ACMA has limited enforcement powers to ensure compliance with the *Telecommunications Act* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. These powers cover the giving of advice, warnings, the issuance of infringement notices and directions to comply, cancel or suspend licences, and to pursue court action. However, the ACMA does not have an express power to accept enforceable undertakings from a person.

The inclusion of an express power to accept enforceable undertakings provides the ACMA with 'a range of pro-active and reactive mechanisms' to ensure compliance.²⁸ The Explanatory Memorandum notes the following advantages of an enforceable undertakings regime:

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- as a voluntary arrangement requiring specified action, it will achieve more effective and focused compliance and be ‘less likely to threaten ...the commercial operations’ of carriers and carriage service providers
- less reliance on costly court action and avoidance of court delays
- regulatory consistency, as the ACMA already has an express power to accept enforceable undertakings for some matters (in relation to commercial emails and address-harvesting software) under the *Spam Act 2003* and it would be in line with the power of the ACCC to accept enforceable undertakings under section 87B of the TPA.²⁹

As the ACMA is responsible for enforcing licence conditions, enforceable undertakings would provide an especially important regulatory tool to enforce those conditions when it believes a serious breach has occurred, or may be likely to occur, removing the need for litigation. At the same time, if an undertaking is subsequently breached and court action is initiated, there will be a greater onus on the defendant to prove that it has adhered to its own voluntary undertaking.

It is noteworthy that, at the recent Senate Inquiry into the Telstra Bills, the inclusion of enforceable undertakings was supported by various groups.³⁰

Remedial Directions – Schedule 13

Certain provisions of the *Telecommunications Act* give the ACMA the power to issue directions. **Schedule 13** amends these provisions to clarify that they are not legislative instruments for the purposes of the Legislative Instruments Act.

This mirrors the amendments made by schedule 11 in respect of a similar power held by the ACCC. Neither direction has the necessary legislative character to be regarded as a legislative instrument.

Other changes to the telecommunications regime

Industry development plans – Schedule 1

Part 2 of Schedule 1 of the *Telecommunications Act* makes provision for industry development plans.

Clause 4 of the Part 2 of Schedule 1 of the Act provides that the ACMA must not grant a carrier licence unless the Minister has approved a current industry development plan by the carrier. An industry development plan is:

a plan for the development in Australia, in connection with the carrier’s business as a carrier, of:

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- (a) industries involved in the manufacture, development or supply of facilities, and
- (b) research and development activities relating to an industry referred to in paragraph (a).

The Explanatory Memorandum notes that the Productivity Commission has found that there is no compelling argument for continuing the requirement of industry development plans.³¹ **Schedule 1** of the Bill repeals Part 2 of Schedule 1 of the *Telecommunications Act*.

ACMA's enforcement powers in relation to industry codes – Schedule 2

Pursuant to sections 121 and 122 of the *Telecommunications Act*, the ACMA has the power to:

- direct a person to comply with an industry code, and
- issue a formal warning to a person who contravenes an industry code.

On a number of occasions the ACA (as predecessor to the ACMA) has given directions to carriers and carriage service providers to comply with industry codes.³²

Schedule 2 of the Bill puts in place provisions to allow ACMA to exercise the enforcement powers under sections 121 and 122 in relation to conduct which occurred under former registered codes which have since been replaced by a new code (as provided by section 120 of the *Telecommunications Act*).

Numbering Plans – Schedule 3

Section 455 of the *Telecommunications Act* requires the ACMA to make a plan (a 'numbering plan') for the:

- numbering of carriage services in Australia, and
- the use of numbers in connection to the supply of such services.

Section 460 of the *Telecommunications Act* provides the ACMA must undertake consultation in relation to the numbering plan.

According to the Explanatory Memorandum:

- the requirements for consultation places unnecessary burden on the ACMA in relation to minor variation of the numbering plans, and
- the time frames for consultation are too long and inflexible.³³

Schedule 3 of the Bill amends section 460 to address these concerns.

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Main Provisions

Schedule 1 – Industry Development Plans

Item 1 of Schedule 1 of the Bill repeals Part 2 of Schedule 1 of the *Telecommunications Act*, which deals with industry development plans.

Item 2 of Schedule 1 puts in place transitional provisions in relation to annual reporting requirements on both the carrier and the Industry Minister for reporting on the progress made in implementing a current industry development plan.

Schedule 2 – Industry Codes

Item 1 of Schedule 2 inserts a **new subsection 121(1B)** into the *Telecommunications Act*. The new subsection enables the ACMA to give directions (in certain circumstances) under subsection 121(1) in circumstances where the conduct to which the direction is given occurred under an industry code which has subsequently been replaced.

Item 2 of Schedule 2 inserts a similar provision (**new subsection 122(4)**) in relation to the ACMA giving formal warnings to a person.

Schedule 3 – Numbering Plans

Item 1 of Schedule 3 amends paragraph 460(3)(a) of the *Telecommunications Act* such that the ACMA does not need to consult where a variation to a numbering plan is taken to be a minor variation.

Item 2 of Schedule 3 reduces the period for consultation on a variation of a numbering plan from 90 to 30 days.

Schedule 4 – Increasing penalties for a breach of the competition rules

Item 1 repeals the current penalty in paragraph 151BX(3)(a) of the TPA for a breach of the competition rules and replaces it with a penalty of:

- \$3 million per day for every day over 21 days that the contravention continues, and
- otherwise \$10 million for each contravention and \$1 million per day that the contravention continues.

Schedule 5 – Enforcement of conditions and limitations of exemption determinations and orders

Items 1 to 4 add a note to the end of existing provisions.

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Items 5 and 6 insert **new subsection 152BB(3)** and **new section 152BBAA**. The effect of these provisions is to give enforcement powers to the Federal Court in relation to conditions or limitations on exemptions to the standard access obligations. The court can enforce compliance of an exemption to the standard access obligations where a person does not comply with the conditions or limitations.

Schedule 6 – Variation and revocation of exemption determinations

Items 1 and 2 insert notes after section 152AS and 152ASA.

Schedule 7 – Procedural Rules

Item 1 amends subsection 25(1) to provide that the power to make procedural rules is not a power that can be delegated by the ACCC. A power under any such procedural rules may be delegated.

Item 2 inserts a definition of ‘modification’. Other amendments refer to ‘modification’. For instance, **items 5 and 6** deal with the ‘modification’ of an application for an exemption. **Items 11, 12, 18 and 19** deal with modifications to undertakings or variations of undertakings.

Item 3 inserts a definition of ‘procedural rules’ and points to **new section 152 ELA** for the meaning of the expression.

Item 4 amends subsection 152(AO)(3). It has the effect that a public inquiry is not required if the ACCC makes a modification to a declaration (of a service under section 152AL) if the modification is minor under the Procedural Rules.

Item 5 and **item 6** amend subsection 152AT(2) and subsection 152ATA(2) to permit a person to modify an application for an order exempting them from the standard access obligations without this being treated as a new application which would start the application process afresh (as it does currently). However, the modification must be a ‘minor modification’ under the terms of the Procedural Rules that are to be made by the ACCC.

Item 7 amends section 152AU to allow the ACCC to refuse an application for an ordinary or anticipatory individual exemption from the standard access obligations if the applicant does not provide further information within the time limit set out in the Procedural Rules.

Item 8 amends subsection 152AU(3) to provide that, if the ACCC, in the Procedural Rules, does not set time limits for the giving of further information, the time limit can be set by the ACCC when it makes the request for information.

Item 9 makes an amendment in similar terms to **item 7** but applies to cases where the ACCC requests information in relation to an ordinary access undertaking. **Item 10** makes

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an amendment in similar terms to **item 8** but applies to cases where the ACCC requests information in relation to an ordinary access undertaking.

Item 11 and **item 12** amend subsection 152BU(1) and subsection 152BY(2) respectively to permit a person to modify an ordinary access undertaking or a variation to an ordinary access undertaking without this being treated as a new undertaking which would start the undertaking process afresh (as it does currently). The modification must be a ‘minor modification’ under the terms of the Procedural Rules that are to be made by the ACCC.

Item 13 amends subsection 152BY(4) to provide that, if the ACCC, in the Procedural Rules, does not set time limits for the giving of further information, the time limit can be set by the ACCC when it makes the request for information.

Item 14 amends subsection 152BZ(2) to allow the ACCC to refuse an application for a variation to an ordinary access undertaking if the applicant does not provide further information within the time limit set out in the Procedural Rules.

Item 15 amends subsection 152BZ(3) to provide that, if the ACCC, in the Procedural Rules, does not set time limits for the giving of further information, the time limit can be set by the ACCC when it makes the request for information.

Item 16 amends subsection 152CCB(2) to allow the ACCC to refuse an application for a special access undertaking if the applicant does not provide further information within the time limit set out in the Procedural Rules.

Item 17 amends subsection 152CBB(3) to provide that, if the ACCC, in the Procedural Rules, does not set time limits for the giving of further information, the time limit can be set by the ACCC when it makes the request for information.

Items 18 and **item 19** amend subsection 152CBC(1) and subsection 152CBG(2), respectively, to permit a person to modify a special access undertaking or to modify a variation to a special access undertaking without this being treated as a new undertaking which would start the undertaking process afresh (as it does currently). However, the modification must be a ‘minor modification’ under the terms of the Procedural Rules that are to be made by the ACCC.

Item 20 amends subsection 152CBG(4) to provide that, if the ACCC, in the Procedural Rules, does not set time limits for the giving of further information, the time limit can be set by the ACCC when it makes the request for information.

Item 21 amends subsection 152CBH(2) to allow the ACCC to refuse an application for a variation to special access undertaking if the applicant does not provide further information within the time limit set out in the Procedural Rules.

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Item 22 amends subsection 152BH(3) to provide that, if the ACCC, in the procedural rules, does not set time limits for the giving of further information, the time limit can be set by the ACCC when it makes the request for information.

Item 23 inserts **new section 152CDA** to allow the ACCC in its Procedural Rules, to defer consideration of an ordinary or special access undertaking or a variation of an ordinary or special access undertaking. Such deferral is possible despite anything else in this Division.

Items 24 to 27 amend sections 152CLA, 152DB, 152DK and 152DMA to make Procedural Rules about how it will deal with access undertakings that are received in relation to a matter that is subject to an access dispute. The Procedural Rules will displace those provisions dealing with ACCC's existing discretion.

Item 28 inserts **new Division 10A** which gives the ACCC the power to make Procedural Rules.

Schedule 8 – 'Any-to-any' connectivity

Schedule 8 inserts a **new Part 7** to Schedule 1 of the *Telecommunications Act*.

Item 1 inserts **new clause 46** which provides that carriers must obtain 'designated interconnection services' from carriage service providers to ensure 'any-to-any' connectivity. **New clause 47(1)** provides that 'designated interconnection services' means any specified eligible service declared by the Minister.

Prior to making a determination for the purposes of **new clause 47(1)**, the Minister must request ACCC to provide a written report as to whether the proposed declaration would achieve the objective of any-to-any connectivity set out in subsection 152AB(8) of the TPA (**new subclause 47(3)**). In making the determination in clause 47(1) the Minister must have regard to the ACCC's report and 'such other matters (if any) as the Minister considers relevant' (**new clause 47(5)**).

Schedule 9 - Amendments to Part XIC of the Trade Practices Act

Schedule 9 makes amendments to section 152AB of the TPA.

Item 1 expands the factors listed in the current paragraph 152AB(2)(e) to which the ACCC must have regard when determining whether a particular thing promotes the long term interests of end-users of listed services. The objective of encouraging the economically efficient use of, and the economically efficient investment in any other infrastructure by which listed services are, or are likely to become, capable of being supplied is added.

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Items 2 to 5 make amendment to subsection 152AB(6) which relate to the factors to be taken into account in assessing whether the objectives in paragraph 152AB(2)(e) are met.

Item 6 inserts new provisions after section 152AB(7) to expressly set out factors to be taken into account when assessing the incentive for investment for the purposes of the **new paragraph 152AB(6)(c)**.

Schedule 10 – Enforceable undertakings

Item 2 of schedule 10 inserts a **new Part 31A** in the *Telecommunications Act* that provides for enforceable undertakings.

New section 572A is a simplified outline of the new enforceable undertakings scheme. It explains that a person may give the ACMA an enforceable undertaking about compliance with the *Telecommunications Act* or the *Telecommunications (Consumer Protection and Service Standards) Act 1997*.

New subsection 572B(1) provides that an undertaking will only be accepted if it is in writing and states:

- the action to be taken, or refrained from, in order to comply with the *Telecommunications (Consumer Protection and Service Standards) Act* or
- the action to be taken to ensure there will be no contravention or likely contravention in the future of that Act.

An undertaking of this kind may be withdrawn, or varied, only with the consent of the ACMA (**new subsection 572B(3)**), and may be cancelled by the ACMA by written notice to the person who gave the undertaking (**new subsection 572B(4)**).

New section 572C deals with enforcement of undertakings.

The ACMA may apply to the Federal Court for an order if an undertaking has been given under **new section 572B** and the ACMA is of the view that there has been a breach of the undertaking by the person who gave it.³⁴

The Federal Court, if satisfied that there has been a breach, may order any one or all of:

- compliance (**new paragraph 572C(2)(a)**)
- payment of an amount ‘up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach’ (**new paragraph 572C(2)(b)**)
- any other order the Court considers appropriate to compensate for any loss of damage suffered by a third party (**new paragraph 572(2)(c)**), and

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- any other order the Court thinks appropriate (**new paragraph 572(2)(d)**).

Schedule 11 – Operational Separation of Telstra

Item 1, 2 and 3 provide for a review to be undertaken before 1 July 2009 into whether the new operational separation provisions are working (**item 3; new subsections 61(2), (3) and (4)**). Following the review, the Minister may declare that the operational separation plan provisions which form part of Telstra’s carrier licence conditions no longer apply (**Item 2; new section 61A**).

Item 4 inserts **new sections 69A and 69B**. Section 69A gives powers to the ACCC to give limited directions to take action to stop a contravention of a condition in the operational separation requirements in Schedule 1 of the *Telecommunications Act*. These powers are the same powers that the ACMA presently has under section 69 of that Act. **New section 69B** allows Telstra to apply to the Australian Competition Tribunal in relation to a direction given by the ACCC under new section 69A.

Item 5 and Item 6 insert a new paragraph into section 70 to enable the ACCC to issue a warning to Telstra about the contravention of a condition in the new operational separation provisions in Part 8 of Schedule 1 of the *Telecommunications Act*.

Item 7 inserts the new operational separation requirements in **Part 8 of Schedule 1**. The provisions in this Part of the Bill are explained earlier in this digest at page 9 and are not repeated here.

Schedule 12 - Interim determinations in access disputes – ACCC and consultation

Schedule 12 of the Bill amends the TPA. **Item 1** inserts **new subsection 152CPA(3)** of the TPA provides that the ACCC may make or vary an interim determination in relation to an access dispute *without* having regard to the requirements of procedural fairness.

Item 2 inserts **new subsection 152CPA(5A)** amends the TPA to allow the ACCC to extend the period of an interim determination for up to an additional 12 months after the initial period of the interim determination.

Item 3 inserts **new subsection 152CPA(5A)** would remove the incentive to delay the arbitration process, and would encourage quicker resolution of arbitrations.

Schedule 13 – Remedial Directions

Items 1, 2 and 3 all clarify the directions given by ACMA under three existing powers (sections 69, 102 and 121) are not legislative instruments under the Legislative

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Instruments Act. This is because they are subject to merits review and therefore would not typically have the necessary legislative character.

Endnotes

- 1 [Telstra \(Transition To Full Private Ownership\) Bill 2005](#). See Ann Palmer and Jonathan Chowns, ‘Telstra (Transition To Full Private Ownership) Bill 2005’, *Bills Digest*, no. 45, Parliamentary Library, Canberra, 2005-06.
- 2 [Telecommunications Legislation Amendment \(Future Proofing and Other Measures\) Bill 2005](#). See Katrina Gunn and Jonathan Chowns, ‘Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005’, *Bills Digest*, no. 44, Parliamentary Library, Canberra, 2005 -06.
- 3 [Appropriation \(Regional Telecommunications Services\) Bill 2005-2006](#). See Richard Webb, ‘Appropriation (Regional Telecommunications Services) Bill 2005-2006’, *Bills Digest*, no. 42, Parliamentary Library, Canberra, 2005-06.
- 4 [Telecommunications \(Carrier Licence Charges\) Amendment \(Industry Plans and Consumer Codes\) Bill 2005](#). See Jonathan Chowns and Ann Palmer, ‘Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005’, *Bills Digest*, no. 41, Parliamentary Library, Canberra 2005-06.
- 5 [Explanatory Memorandum](#), Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, p. 11.
- 6 The [Explanatory Memorandum](#), at page 14, notes that the “the model commits Telstra to operational and organisational separation of the wholesale business unit and key network functions from the retail business units including, separate staff and premises and staff incentive programs to ensure equivalence is provided”.
- 7 Proposed new subclause 48(1), Part 8, Schedule 1 *Telecommunications Act 1997*
- 8 Productivity Commission, [Review of National Competition Policy Reforms](#), Productivity Commission, Australia, 2005, p. 47.
- 9 Graeme Samuel, ‘Learn to live with regulation, Samuel says’, *Inside Business*, [transcript](#), 21 August 2005.
- 10 See, for example, Alan Kohler, ‘T3 and the art of pollyspeak’, *Sydney Morning Herald*, 20 July 2005, p. 25.
http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:GFPG6%3B
- 11 Evidence of Bill Scales, Group Managing Director, Corporate and Human Relations, Telstra to the Senate Environment, Communications, Information Technology And The Arts References Committee, Inquiry into the Performance Of The Australian Telecommunications Regulatory Regime, [Transcript of evidence](#), 4 May 2005, p. 80.

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- 12 [Explanatory Memorandum](#), op. cit. p. 26.
- 13 Explanatory Memorandum, op. cit. p. 69.
- 14 Explanatory Memorandum, op. cit. p. 5.
- 15 Evidence of Kate McKenzie, Managing Director, Regulatory, Telstra to the Senate Environment, Communications, Information Technology And The Arts References Committee, Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills, [Transcript of evidence](#), 9 September 2005, p. 104.
- 16 [Explanatory Memorandum](#), op. cit., p. 27.
- 17 The [Carrier Licence Conditions \(Telstra Corporation Limited\) Declaration 1997 \(Amendment No. 2 of 2005\)](#) requires Telstra to give the Minister a draft local presence plan setting out the range of activities and strategies the licensee deploys or will deploy in regional, rural and remote Australia to fulfil its local presence obligations under the licence condition
- 18 Telstra Local Presence Plan.
<http://www.telstra.com/countrywide/presenceplan/?SMSESSION=NO>, p. 27.
- 19 Section 5, *Legislative Instruments Act 2003*
- 20 [Explanatory Memorandum](#), op. cit., p. 8
- 21 This Bill is part of this suite of ‘Telstra sale’ legislation.
- 22 [Explanatory Memorandum](#), op. cit., p. 4.
- 23 Evidence of David Havyatt, Head of Regulatory Affairs, AAPT Ltd, to the Senate Environment, Communications, Information Technology and the Arts Legislation Senate Committee, Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills, [Transcript of evidence](#), 9 September 2005, p. 27.
- 24 [AAPT Ltd submission](#) to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills September 2005, p. 5.
- 25 An exception applies if the arbitration is terminated (section 152CS).
- 26 [Australian Telecommunication Users Group \(ATUG\) submission](#) to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills September 2005, 12 September 2005, p. 10.
- 27 Evidence of Peter Stiffe, General Manager, Public Policy, Vodafone, to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills, [Transcript of evidence](#), 9 September 2005, p. 52; see also the [Vodafone submission](#), 9 September 2005, p. 7.
- 28 [Explanatory Memorandum](#), op. cit., p. 34.
- 29 *ibid.*, p. 34.

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- 30 See [Australian Telecommunication Users Group \(ATUG\) submission](#), 12 September 2004, op. cit., p. 10; and [Small Enterprise Telecommunications Centre Limited \(SETEL\) submission](#), 8 September 2005, which notes general support for additional ACMA regulatory powers in order to ‘lessen reliance on the self-regulatory regime and hopefully encourage better practices...’, p.2; [Consumers Telecommunications Network \(CTN\) submission](#), 9 September 2005, p. 4, which likewise supports greater enforcement powers for the ACMA.
- 31 [Explanatory Memorandum](#), op. cit., p. 9.
- 32 [Senate Committee Report](#), Environment, Communications, Information Technology and the Arts Legislation Senate Committee, Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills, 9 September, op. cit., p. 18-19.
- 33 [Explanatory Memorandum](#),, op. cit., pp. 9-10.
- 34 In contrast, subsection 87B(3) of the TPA provides that the ACCC may apply to the Federal Court for an order ‘if it considers that the person who gave the undertaking has breached any of its terms’. In this Bill, the drafting of the provision suggests that the requisite breach must be significant and not just a breach of any of the terms. This distinction may become a matter for the courts.

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